

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TIMOTHY G. WILLIAMS

Claimant

VS.

ELKHORN VALLEY PACKING CO. INC.

Respondent

AND

**ACE PROPERTY & CAS. INS. CO.
and LIBERTY MUTUAL INS. CORP.**

Insurance Carrier

Docket No. 1,040,972

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier Ace Property & Casualty Insurance Co. (ACE) requested review of the March 18, 2009, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Kevin T. Stamper, of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent and ACE. John M. Graham, Jr., of Overland Park, Kansas, appeared for respondent and its insurance carrier, Liberty Mutual Insurance Corporation (Liberty Mutual).

The Administrative Law Judge (ALJ) authorized Dr. Paul Stein to continue as claimant's authorized treating physician and further requested that Dr. Stein give a permanent partial impairment rating and restrictions if he has determined that claimant is at maximum medical improvement.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 17, 2009, Preliminary Hearing and the exhibit; the transcript of the

December 18, 2008, Preliminary Hearing and the exhibits; together with the pleadings contained in the administrative file.¹

ISSUES

Respondent and ACE argue that claimant suffered an intervening accident or accidents during and after his employment with respondent that relieve ACE of liability for future benefits. Specifically, respondent and ACE contend that claimant suffered an intervening accident while helping his brother move or while working for a subsequent employer. In the alternative, respondent and ACE request that the Board find that claimant suffered a series of accidents each and every working day at respondent up until the date of his termination, thereby finding Liberty Mutual responsible for providing claimant's workers compensation benefits.

Respondent and Liberty Mutual argue that ACE did not appeal a December 22, 2008, preliminary hearing order entered by the ALJ that found claimant sustained an injury in December 2006 and ordered ACE to provide medical benefits with Dr. Stein. Respondent and Liberty Mutual, therefore, request that the Board dismiss this appeal to the extent that it seeks to change the date of accident because it is not timely. If the Board allows ACE to proceed with this appeal as timely, Liberty Mutual requests the Board to affirm the ALJ's original decision of December 22, 2008, finding that claimant's date of accident was in December 2006, during the period ACE had respondent's workers compensation insurance coverage.

Claimant contends that this appeal is not from the Order entered by the ALJ on March 18, 2009, but is actually an appeal of the ALJ's December 22, 2008, Order and, therefore, should be dismissed.

The issues for the Board's review are:

(1) Does the Board have jurisdiction to determine claimant's date of accident at this time?

(2) Does the Board have jurisdiction over the question of whether claimant is in need of additional medical treatment or is he, instead, at maximum medical improvement?

¹ Respondent's [ACE] Appeal Brief to the Kansas Workers Compensation Appeals Board contains references to testimony of Lindsey Daugherty and John Bustraan. Although there was discussion about these depositions at the December 18, 2008, preliminary hearing, the file provided to the Board by the ALJ does not contain those two deposition transcripts. When asked, the ALJ's office said they did not have them. This Board Member, therefore, assumes that the ALJ did not consider the testimony of Lindsey Daugherty or John Bustraan. As the Board only considers the same record that was considered by the ALJ, no attempt was made to obtain those deposition transcripts from counsel. See K.S.A. 2008 Supp. 44-555c(a).

(3) Did claimant suffer an intervening accident?

FINDINGS OF FACT

Claimant has claimed a work-related back injury suffered "12/2006 and each and every work day thereafter."² He was terminated from his job at respondent for reasons not related to his injury on June 28, 2008. ACE provided respondent with workers compensation insurance coverage in December 2006, continuing until April 1, 2008. Liberty Mutual provided respondent with workers compensation insurance coverage beginning April 2, 2008, and had coverage through claimant's last day worked at respondent.

A preliminary hearing was held on December 18, 2008, wherein claimant requested medical treatment. At that hearing, claimant argued he had an initial injury in December 2006 with subsequent aggravations through his last day worked. Testimony was taken from claimant about his job duties at respondent between December 2006 and April 1, 2008, and to June 28, 2008, as well as subsequent to his employment. ACE argued that if claimant had a back injury, it would have been the result of a series of accidents that occurred through his last day of work or from subsequent work activities after he left his job at respondent. Liberty Mutual concurred with ACE that claimant was performing activities after he left his employment at respondent that may have made his back condition worse. However, Liberty Mutual argued that claimant suffered a single injury in December 2006 and his current problems were a natural and probable consequence of that injury.

On December 22, 2008, the ALJ entered an Order finding that claimant was injured out of and in the course of his employment with respondent and also finding his date of accident to be December 2006. Accordingly, the ALJ authorized Dr. Paul Stein to be claimant's authorized treating physician and ordered ACE to pay for claimant's medical treatment. This order was not appealed.

On February 2, 2009, respondent and ACE filed an Application for Preliminary Hearing after having served claimant with a notice of its intent to terminate all benefits because claimant had permanently aggravated his injury after his employment with respondent ended. A hearing was held on March 17, 2009.

At the March 17, 2009, hearing, Rodney Lewallen testified that he had worked with claimant at respondent. Mr. Lewallen provided claimant with side jobs after he was terminated by respondent. In one such job, claimant did some mowing for him. He did not know if claimant did any weed eating or if he just mowed. He said that claimant used a riding mower. Mr. Lewallen was not present and did not see claimant do the mowing. Another time, claimant helped Mr. Lewallen move four or five items, including dressers and

² K-WC E-1, Application for Hearing filed July 9, 2008.

beds, from a house to a storage unit. Claimant's son also helped with the moving, and Mr. Lewallen said that claimant's son probably lifted more than claimant did because he is a "big boy."³ Mr. Lewallen also said he was not present for the entire moving job. He also hired claimant to cut down a tree. Again, he was not present when the tree was cut down and did not know if claimant had any help with the job.

At the end of the hearing, and in his March 18, 2009, Order, the ALJ concluded that Dr. Stein was to continue to be claimant's authorized treating physician. Although not specifically set out at the preliminary hearing or in the Order, it can be presumed that the ALJ continued to find that claimant did not suffer an intervening injury and that ACE was to continue providing claimant's medical treatment.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-551(i)(1) states in part: "All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days."

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.⁴

³ P.H. Trans. (Mar. 17, 2009) at 13.

⁴ *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002); cf. *Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.⁵

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,⁶ the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,⁷ the court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*,⁸ the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

⁵ See *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998).

⁶ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

⁷ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

⁸ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

In *Graber*,⁹ the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was “a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back.”¹⁰

In *Logsdon*,¹¹ the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Worker’s Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

When a claimant’s prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,¹² the Kansas Supreme Court states: “When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury.”

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

⁹ *Graber v. Crossroads Cooperative Ass’n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

¹⁰ *Id.* at 728.

¹¹ *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

¹² *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

¹³ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁴

ANALYSIS

Claimant has alleged a series of accidents. Respondent changed insurance carriers during the period of time alleged. In his Order of December 22, 2008, the ALJ found claimant's date of accident to be during the coverage period of ACE, and therefore, ACE was ordered to pay for the preliminary benefits. ACE disputes the ALJ's determination of accident date, but this is not a jurisdictional issue on an appeal from a preliminary hearing order. Furthermore, it does not appear that this issue was raised to the ALJ during the March 17, 2009, preliminary hearing. Counsel for respondent and ACE argued that claimant's present need for medical treatment was due to his subsequent activities with other employers, not his subsequent work activities with respondent.

JUDGE CLARK: This is Docket Number 1,040,972. Timothy Gene Williams is the Claimant. Elkhorn Valley Packing is the Respondent. This is a preliminary hearing.

Why are we here today?

[Attorney for Respondent/ACE] Judge, this is actually a preliminary hearing that was scheduled by my office on behalf of the Respondent. We had a previous hearing at which you found the date of accident December of 2006 based on the report from Dr. Stein.

Today we have some additional evidence to offer regarding the Claimant's activities subsequent to his employment at EVP, and it would be our position that the subsequent activities are the direct and proximate cause of any need for additional medical care at this point in time.

However, the exhibit that's been marked and put in front of you right now was received from Dr. Stein's office just yesterday. And after Dr. Stein had done some diagnostic testing, a diskogram specifically, he's essentially found that Mr. Williams is at maximum medical improvement, and in the previous report from Dr. Stein, he had issued an impairment rating and work restrictions.¹⁵

Respondent and ACE further argue that claimant is now at maximum medical improvement. This is supported by the March 13, 2009, report of Dr. Stein, the authorized treating physician. "I do not have a recommendation for surgery. Unfortunately, there is nothing further that I can recommend."¹⁶ Nevertheless, the ALJ's Order of March 18, 2009, specifically states that "Dr. Stein will continue to be the Claimant's authorized treating

¹⁴ K.S.A. 2008 Supp. 44-555c(k).

¹⁵ P.H. Trans. (March 17, 2009) at 4-5.

¹⁶ P.H. Trans. (March 17, 2009), Cl. Ex. 1.

physician.”¹⁷ On appeal from a preliminary hearing order, the Board does not have jurisdiction of the issue of whether claimant is in need of additional medical treatment.

There was no new credible evidence presented at the March 17, 2009, preliminary hearing that claimant has suffered an intervening injury. The testimony of Mr. Lewallen was not persuasive that claimant’s subsequent work activities constituted a new accident or accidents or that claimant suffered any worsening of his condition or new injuries from those activities.

CONCLUSION

(1) The Board is without jurisdiction to determine claimant’s date of accident for purposes of deciding which insurance carrier may be liable for preliminary benefits.

(2) The Board is without jurisdiction to decide the issue of whether claimant is in need of additional medical treatment on an appeal from a preliminary hearing order.

(3) Respondent has failed to prove that claimant suffered an intervening accident and injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated March 18, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2009.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier ACE
John M. Graham, Jr., Attorney for Respondent and its Insurance Carrier Liberty
Mutual
John D. Clark, Administrative Law Judge

¹⁷ ALJ Order (March 18, 2009).